Finfrock Motor Sales *and* District No. 123, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner. Case 38–RC–1234

May 11, 1973

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election executed on September 26, 1972, an election by secret ballot was conducted on October 31, 1972, under the direction and supervision of the Regional Director for Region 13 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately seven eligible voters, five cast ballots, of which three were for, and two against, the Petitioner, and none were challenged. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.[1]

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on February 13, 1973, issued and duly served on the parties his report on objections in which he recommended that the Employer's objections be sustained, that the election be set aside, and that a new election be directed. Thereafter, the Intervenors filed timely exceptions [2] to the Regional Director's report, and the Employer filed an answering brief.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by the Employer in the preparation, repair, maintenance, and servicing of new and used vehicles, including parts department employees; but excluding office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.

5. The Board has considered the objections, the Regional Director's report, and exceptions thereto, together with the briefs and, finding merit in the Intervenors' exceptions, has decided to reject the Regional Director's recommendation.

The background for this case begins in 1969 when the Intervenors requested that the Board furnish them the names and home addresses of the employees eligible to vote in certain representative elections, commonly known as the *Excelsior* list,[3] for the purpose of conducting a voting study. When the Board denied their request because of its fear that the study would upset the laboratory conditions required for conducting a fair election, the Intervenors filed suit in the District Court for the District of Columbia, claiming that they were entitled to the lists under the Freedom of Information Act. The court directed that we furnish the lists, the United States Court of Appeals affirmed that ruling,[4] and the Supreme Court [5] denied our application for a stay of the district court's order.

In the study, the Intervenors, through a number of interviewers, questioned employees both before and after an election basically about their attitudes towards union representation and the campaign tactics utilized by the parties. In the present case, the Intervenors questioned all seven unit employees at home or over the telephone. The Employer's objections claim that the survey and the "questioning and exchange of

[1] On January 10, 1973, Professors Stephen B. Goldberg, Julius G. Getman, and Jeanne B. Herman moved for leave to intervene in the instant proceeding for the limited purpose of being heard in opposition to the Employer's objections and filed a memorandum in opposition to the objections. The Regional Director granted the motion in his Report on Objections.

[2] In view of the Regional Director's action in granting the professors' motion to intervene and the fact that no exceptions to this decision were filed, we shall entertain the Intervenors' exceptions. While our dissenting colleagues argue that the professors are not parties to this proceeding, Sec 102.65(b) of the Board Rules and Regulations provides that:

> Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or by other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding

This rule provides, therefore, that even in situations in which intervention is limited, as here, the intervenors thereby are made a party to the proceeding and, as such, may file exceptions under Sec. 102.69(c).

The purpose of this rule seems particularly applicable here. Since the professors were permitted to intervene for the purpose of being heard in opposition to the Employer's objections, they became a party for that purpose. Thus they are privileged to except to rulings relating to their interest in the proceeding. This they have done.

Furthermore, to suggest that our holding herein will allow *amici curiae* to file objections, exceptions, and appeals, as is done by our dissenting colleagues, is to misread the true meaning of this case. An *amicus curiae,* by definition, is without interest in the litigation and is a bystander who aids the court. "He cannot file pleadings or motions of any kind, . . . can reserve no exception to any ruling of the court, and of course cannot prosecute an appeal." *In re Perry,* 148 N.E. 163, 165. In contrast, the professors have intervened, have become parties, and, therefore, have the right to file exceptions.

[3] See *Excelsior Underwear Inc.,* 156 NLRB 1236; *N L R B* v. *Wyman-Gordon Co,* 394 U.S. 759.

[4] 450 F 2d 670.

[5] 404 U.S. 1204.

information between the voters and the interviewers so disrupted the election atmosphere that the employees were precluded from exercising a free choice." The Regional Director concluded that the interrogation and probing by the survey had a reasonable tendency to impede free voter choice and interfere with the election, and he therefore recommended that the election be set aside. In essence, the Intervenors argue that the Regional Director's conclusions are based purely on speculation and that there is no empirical support for the finding that the interviews disrupted the election.

In evaluating the facts of this case, we are compelled to conclude that there is no evidence to suggest that the survey had a probable impact on the employees' free choice, and that, therefore, the election must stand. While it is clear that the employees were questioned extensively with regard to their voting intent and other matters, the record is devoid of any evidence that the interviewers or the questions themselves in any way coerced the employees or prejudiced their free choice.

Accordingly, as the tally shows that the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for District No. 123, International Association of Machinists and Aerospace Workers, AFL–CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

MEMBER JENKINS AND MEMBER KENNEDY, dissenting:

We would affirm the report of the Regional Director in this matter. In our view Professors Getman, Goldberg, and Herman are not parties to this proceeding within the meaning of Section 102.69 of the Board Rules and Regulations and have no standing to file exceptions to the Regional Director's report. In our judgment, the action of the Regional Director in granting the professors leave to intervene "for the limited purpose of being heard in opposition to the Employer's objections" did not entitle them to the status of a formal party. See *New York Shipping Association,* 108 NLRB 135, 138.[6]

Since no "party" to the proceeding has filed exceptions, we would adopt the report of the Regional Director on the objections herein.

[6] The majority attaches too much weight, we think, to the Regional Director's use of the word "intervention" in allowing the Professors to participate in this proceeding. Their participation was expressly limited to "being heard in opposition to the Employer's objections," and plainly excluded them from anything beyond this. Thus the Board's rule on intervention is inapplicable. To read it to confer "party" status on the professors, as our colleagues do, would allow *amici curiae,* allowed to participate only to express their views, to file objections, exceptions, appeals, and otherwise control the course of the case, though their real interest is not that of a party but a concerned bystander. To thus elevate the consequences of the Regional Director's casual use of the word "intervention" when he plainly meant, and stated, that he was limiting the professors' participation to expression of their views, is to distort the purpose and substance of the Board's rule on intervention.